No. SC-2022-0719

IN THE SUPREME COURT OF ALABAMA

SPRINGHILL HOSPITALS, INC., D/B/A SPRINGHILL MEMORIAL HOSPITAL,

APPELLANT,

V.

PATRICIA BILBREY WEST, ADMINISTRATIX OF THE ESTATE OF JOHN DEWEY WEST, JR., DECEASED,

APPELLEE.

From the Circuit Court of Mobile County
CV-2016-901045

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Controlling law cannot be overcome by ignoring it. But that is exactly what Plaintiff tries to do in an effort to hold onto her unprecedented punitive-damages judgment. She repeatedly disregards the plain language of the Alabama Medical Liability Act, which prohibits highly prejudicial evidence that the trial court admitted at trial. And over and over, Plaintiff fails to even mention controlling Alabama caselaw that establishes the multiple bases for a new trial. Obfuscation is no ticket to appellate victory.

Realizing that the law is not on her side, Plaintiff bombards the Court with a seemingly endless barrage of meritless waiver arguments. But the record shows that Springhill properly preserved its arguments. In several instances, Plaintiff squarely states that Springhill failed to make a certain argument below, when the record establishes the exact opposite. Although those sorts of counterfactual assertions may fit in the pages of a George Orwell novel, they will not work here.

The bottom line is this: The jury decided this case based on evidence it never should have heard and without the benefit of other highly relevant evidence, on theories that never should have been permitted to

proceed. Each of those problems separately requires a new trial, and collectively they make the need for a new trial unassailable. And although the Court should not need to reach the issue of the amount of the punitive-damages award, Plaintiff does not contest that the $10 million award equates to 250% of the highest post-*BMW v. Gore* award in a medical-liability wrongful-death case that had been rendered at the time of Mr. West's death. Springhill certainly lacked fair notice of the potential for an award of that magnitude, making it constitutionally defective. Moreover, Springhill's conduct does not rise to the level of reprehensibility that would come anywhere close to justifying this unprecedented award.

ARGUMENT

I. This Court should reverse and remand for a new trial.

Springhill identified multiple separate and independent errors that compel a new trial. Plaintiff's efforts to dodge those errors are unavailing.

Plaintiff bases her opposition on the wrong standard for new trial. Red Br.18 (quoting *Boudreaux v. Pettaway*, 108 So. 3d 486, 487 n.1 (Ala. 2012)). She relies on the new-trial standard for a verdict that is contrary

to the weight of the evidence—not the new-trial standard for a trial court's erroneous rulings or the good count/bad count rule. A new trial is required if the trial court made an erroneous ruling that "probably injuriously affected substantial rights of the part[y]." *Baptist Health Sys., Inc. v. Cantu*, 264 So. 3d 41, 45 (Ala. 2018) (citation omitted). And a new trial is also mandatory if the trial court submitted a good count and a bad count to the jury "and the jury returns a general verdict." *Long v. Wade*, 980 So. 2d 378, 385 (Ala. 2007) (citation omitted).

A. Dr. Rothfield did not meet Section 6-5-548's requirements.

Plaintiff does not dispute that Dr. Rothfield testified to the nursing standard of care. *See* Red Br.22-28. Nor does she dispute that Dr. Rothfield did not meet the plain-language requirements of Section 6-5-548—*i.e.*, the requirement that an expert must be a "similarly situated health care provider." *Id.* Those points confirm that the trial court erred in allowing Dr. Rothfield to testify as to the nursing standard of care.

Section 6-5-548 is unambiguous: "A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care *only if he or she is a 'similarly situated health care provider*.'" Ala. Code

§ 6-5-548(e) (emphasis added). And a "similarly situated healthcare provider" is one who (1) is "licensed by the appropriate regulatory board or agency of this or some other state"; (2) is "trained and experienced in the same discipline or school of practice"; **and** (3) has "practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred." *Id.* § 6-5-548(b).

Admittedly unable to meet the "literal requirements" (Red Br.27) of Section 6-5-548 (*i.e.*, a licensed, trained, and practicing nurse), Plaintiff tries to rewrite the statute. She invokes cases that purportedly allow witnesses who do not meet Section 6-5-548 to nonetheless testify. *See* Red Br.24-26 (citing *Rogers v. Adams*, 657 So. 2d 838 (Ala. 1995); *Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So. 2d 801 (Ala. 2003); *Dowdy v. Lewis*, 612 So. 2d 1149 (Ala. 1992); *HealthTrust Inc. v. Cantrell*, 689 So. 2d 822 (Ala. 1997); *Leonard v. Providence Hosp.*, 590 So. 2d 906 (Ala. 1991)). Based on those cases, she insists that Dr. Rothfield could testify about the duties "owed by *all* hospital personnel" related to opioid safety

because he was "this country's foremost expert on hospital opioid safety."[1] Red Br.23-24.

Plaintiff is wrong. This Court has consistently applied the statute's plain language and demanded strict compliance with Section 6-5-548. *See*, *e.g.*, *Youngblood v. Martin*, 298 So. 3d 1056, 1061 (Ala. 2020) ("based on the plain language of the statute," doctor not permitted to testify as expert because plaintiff did not present evidence to establish that the Section 6-5-548(b) factors were met)*; Nall v. Arabi*, --- So. 3d ---, 2022 WL 3572660, at *6 (Ala. Aug. 19, 2022) (strictly enforcing the "plain" "standard set out in § 6-5-548(c)"); *Hannah v. Naughton*, 328 So. 3d 777, 790-91 (Ala. 2020) (because Section 6-5-548 is "plain and unambiguous," no "reasonable reading" would "allow testimony from a proffered expert who 'was' once board certified in the same specialty" but "who was no longer so certified").

The statute includes no exception to its requirements, and if previous court decisions crafted one, they departed from the statute's meaning. To "stray from the plain meaning of [the] statute" by creating

[1] Plaintiff cites nothing supporting the outlandish assertion that Dr. Rothfield is the "foremost expert on hospital opioid safety."

unmentioned exceptions would "turn this Court into a legislative body." *Ex parte City of Millbrook*, 304 So. 3d 202, 205 (Ala. 2020) (citation omitted). To the extent that *Rogers*, *Dowdy*, *Hodgen*, *Cantrell*, and *Leonard* say that an expert—who is purportedly highly qualified on a general topic—need not meet Section 6-5-548's requirements,[2] those decisions have been overruled *sub silentio* by this Court's consistent and more recent application of the statute's plain language (*e.g.*, *Youngblood*, *Nall*, and *Hannah*). *See Sessions v. Nonnenmann*, 842 So. 2d 649, 654 (Ala. 2002) (later cases *sub silentio* overrule prior cases with contrary holdings).

Perhaps recognizing that Dr. Rothfield flunked Section 6-5-548's test, Plaintiff turns to a meritless waiver argument. She claims that Springhill "did not timely and specifically object or move to strike Dr. Rothfield's testimony." Red Br.23. The record tells a different story:

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[2] Those cases do not sweep nearly as far as Plaintiff suggests. Neither *Hodgen* nor *Leonard* involved the admissibility of testimony under Section 6-5-548. *Hodgen*, 884 So. 2d at 801; *Leonard*, 590 So. 2d at 907-08. *Rogers* involved a situation where the testifying expert was qualified to perform the procedure made the basis of the action, 657 So. 2d at 841-42. *Cantrell* involved an operating technician, which is not licensed by the state, so part of Section 6-5-548 did not even apply. 689 So. 2d at 826-27. And *Dowdy* involved experts with nursing degrees testifying as to the nursing standard of care. 612 So. 2d at 1152.

> The Witness: That order went right through the pharmacy to the nursing staff. And I would expect a nurse to also recognize the --
>
> Mr. Lee: Same objection. He's not been qualified for nursing.
>
> The Court: Overruled.
>
> The Witness: I would expect a nurse to recognize that 4 milligrams of Dilaudid is an enormous dose that would never be appropriate and that it was confusing. And I would expect a nurse in that situation to call the doctor and say, hey, Dr. McAndrew, this Nurse Elenwa. I've got Mr. West here and he's complaining of pain. I'm looking at your order. You don't really want to give him 4 milligrams of Dilaudid, do you, every three hours? But that didn't happen either.

R.811. Springhill then moved to strike the testimony:

> Mr. Lee: Yeah. And so we'd move to strike that testimony. We don't think that he was qualified as to a pharmacist or a nurse and it would -- it's error for that testimony to come in.
>
> …
>
> The Court: Okay. So noted. Your motion is respectfully denied.

R.899-901. The issue is preserved.[3]

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[3] Plaintiff's contention that Springhill did not satisfy Ala. R. App. P. 28(a)(5) is meritless. Springhill identified the places in the record where the trial court made the rulings that Springhill challenges on appeal. *See* Blue Br.2-6. Plaintiff also repeats the trial court's erroneous statement that Springhill failed to demonstrate during the post-judgment proceedings where it had raised and preserved the various issues it presented. Springhill advised the trial court where it had raised those

Finally, Plaintiff insists that the improper evidence was harmless because she "presented expert testimony about the same nursing duties and breaches of the standard of care from witnesses" who met the "literal requirements of § 6-5-548(b)" and elicited testimony about Nurse Elenwa's duties and breaches from other witnesses. Red Br.27. But that ignores that a new trial is the proper remedy if the jury hears evidence from an expert who is not similarly situated as Section 6-5-548 requires. *See Mihelic v. Sullivan*, 686 So. 2d 1130, 1131 (Ala. 1996).

Plaintiff's own trial tactics also fatally undermine this argument. When Springhill offered its nursing standard-of-care expert—one who met the statutory requirements—Plaintiff used Dr. Rothfield's improper testimony to attack her. R.2222. The reason for that is clear: Juries "may give . . . undue weight" to a doctor's testimony given the doctor's "status as a physician." *Ali v. Connick*, No. 11-CV-5297, 2016 WL 3002403, at *10 (E.D.N.Y. May 23, 2016). Put simply, Plaintiff does not deny that

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issues (even though no rule required Springhill to provide that information). *See* Blue Br.45n.10.

she weaponized Dr. Rothfield's improper testimony; instead, she asks this Court to ignore it.[4]

B. In violation of Section 6-5-551, the trial court admitted evidence of an unpleaded omission.

Plaintiff does not dispute that she introduced evidence of an alleged omission by Springhill that she did not plead in her complaint. *See* Red Br.28-33. Instead, she tries to recast Section 6-5-551 and asserts baseless waiver arguments. Both tactics fail.

In an audacious attempt to avoid Section 6-5-551, Plaintiff tries to rewrite part of the statute and ignores the rest. Plaintiff claims that Springhill failed "to show how evidence of a nurse's failure to document something could be deemed a proximate cause of Mr. West's death so as to trigger § 6-5-551's prohibition of evidence of acts or omissions which 'render the health care provider liable to the plaintiff.'" Red Br.29 (emphasis omitted). No such showing is required. Section 6-5-551

[4] Plaintiff largely ignores Springhill's argument that Dr. Rothfield improperly testified to the pharmacist standard of care. *See* Blue Br.24n.4. Contrary to her contention, Springhill timely objected. R.810,899-901. She also is incorrect that Springhill should have objected to the limiting instruction. Any such objection would have been pointless because no limiting instruction could have cured the prejudice two weeks after the testimony.

requires a plaintiff to "include in the complaint" a "detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable." And a party "shall be prohibited . . . from introducing at trial evidence of *any* other act or omission." *Id.* (emphasis added).

So an act or omission is either a basis for liability—in which case it must be pled in the complaint—or it is prohibited from introduction at trial. Plaintiff's argument would flip Section 6-5-551 on its head. Under her rationale, a plaintiff could introduce any evidence of other acts or omissions, so long as she claimed that the act or omission was not a basis for liability. That plainly is not what the statute says—there is no liability "trigger" to Section 6-5-551's prohibition of other acts or omissions. Instead, Section 6-5-551 "prohibits the admission into evidence at trial of acts or omissions by a health-care provider that are not related to the acts or omissions giving rise to the complaint." *Cantu*, 264 So. 3d at 45. In *Cantu*—which Plaintiff ignores—this Court ordered a new trial because the plaintiff introduced evidence of "prior medical-malpractice actions brought against" the hospital. *Id.* Those prior claims

could not have given rise to liability, yet the Court held that they were plainly improper.[5]

Having no credible argument to offer on the meaning of Section 6-5-551, Plaintiff again tries to manufacture waiver where none exists. She says that the "issue as now framed" is "different from the issue" Springhill raised in its post-judgment motion, brief, and hearing and that Springhill failed to "specify in its new trial motion how the circuit court erred." Red Br.28 & n.27. Not so—Springhill has consistently asserted the same argument as a basis for new trial:

- **Blue Brief**: "A new trial must also be ordered because the trial court allowed Plaintiff to introduce evidence of an omission that she did not plead in her complaint. Specifically, the trial court admitted evidence that Nurse Elenwa failed to document the administration of Narcan to Mr. West, even though Plaintiff had not mentioned that omission in her complaint." Blue Br.25.

- **Post-judgment motion**: "The Court erred by admitting evidence related to other acts or omissions that were not pleaded by plaintiff in her complaint as required by Ala. Code § 6-5-551, including, but not

[5] Plaintiff also ignores that she belatedly tried to assert the alleged failure to document the administration of Narcan as a basis for liability in her third amended complaint. *See* C.1103.

limited to, evidence related to Narcan doses that were allegedly administered to West." C.2608-09.[6]

- **Post-judgment brief**: "Springhill is entitled to a new trial because . . . the Court permitted Plaintiff to introduce evidence relating to Narcan—*i.e.*, that Mr. West had been billed for five units of Narcan that were not reflected as administered in the medical record" in "clear violation of Ala. Code § 6-5-551." C.2799.

- **Post-judgment hearing**: "[T]he court allowed them to . . . introduce evidence about Narcan . . . the administration of which was not reflected in the medical record. And, of course, nothing about a failure to record it in the medical record was noted in the operative complaint." R.3209-10.

Plaintiff's frivolous waiver arguments don't end there. She insists that the "blue brief . . . fails to show where this precise issue was timely raised or preserved with a specific objection or adverse ruling." Red Br.28-29. That is wrong. Springhill explained that "the trial court absolutely and unconditionally denied Springhill's motion in limine to exclude evidence of the undocumented administration of Narcan to Mr. West." Blue Br.3 (citing C.1760-71,2319). And when, as here, a trial

[6] Springhill's post-judgment motion also argued that, as "to each of Springhill's objections to evidence that was not sustained, separately and severally, the [trial court] erred by admitting the evidence." C.2608. And Springhill unquestionably sought to exclude evidence or argument "regarding the undocumented Narcan that was allegedly administered by Nurse Elenwa," C.1760,1765-66, which the trial court denied. C.2319.

court denies an absolute motion in limine, a party need not object again at trial to preserve the error for review. *See Phelps v. Dempsey*, 656 So. 2d 377, 381 n.1 (Ala. 1995). Plaintiff admits that Springhill's motion was formally denied (Red Br.31) and does not contest that it was an absolute ruling on the motion in limine.[7]

The Narcan evidence was prejudicial, and Plaintiff's silence on that point is telling. Indeed, she does not deny that if the evidence was improperly admitted, it was prejudicial. Rather, Plaintiff asserts another waiver argument based on her misunderstanding of the law—she conflates the analysis of whether an evidentiary error is prejudicial with a separate ground for a new trial based on improper closing argument. *See* Red Br.32 (Springhill "failed to object and did not request any curative instruction or mistrial" for Plaintiff's closing argument "that the jury should find SMH liable for Nurse Elenwa's failure to document her administration of Narcan."). Plaintiff misses the point. Springhill

[7] Plaintiff suggests that Springhill's motion in limine differs from its current argument because it addressed administration of Narcan, "not that [Nurse Elenwa] failed to document it." Red Br.30n.25. Not so. Springhill's motion sought to exclude any evidence or argument "regarding the undocumented Narcan that was allegedly administered by Nurse Elenwa." C.1760,1765.

pointed to Plaintiff's counsel's closing argument as an indication of the prejudice stemming from the improper admission of the evidence. Springhill never argued that the closing argument provided a separate and independent basis for a new trial. *See* Blue Br.27. Plaintiff cites no caselaw holding that a party cannot rely on opposing counsel's comments in closing argument about evidence admitted at trial to establish prejudice from the admission of that evidence unless the party objected to the closing argument. For good reason—no such authority exists.

C. The trial court improperly excluded evidence of other hospitals' contemporaneous practices.

The trial court erred in excluding factual evidence about what most hospitals were doing in 2014 as to use of continuous pulse oximetry. Indeed, Plaintiff does not contest that evidence of other hospitals' practices was relevant; that expert testimony can be rebutted by fact testimony; and that Dr. Downs's and Nurse Nash's testimony about other hospitals' practices was factual.[8] Red Br.33-42. The precious little that Plaintiff does dispute, she gets wrong.

[8] Plaintiff repeatedly tries to "readopt[] and reassert[]" arguments made below. Red Br.33n.28,78,90. But "[i]ncorporation into an appellate brief of arguments made in a trial brief is not proper," and this Court "do[es]

As to Dr. Downs, Plaintiff claims that his testimony was inadmissible because his deposition did not "establish[] his credentials as a licensed physician qualified to testify under § 6-5-548 or Ala. R. Civ. P. 32(a)." Red Br.33-36 (citing *Prowell v. Children's Hosp. of Ala.*, 949 So. 2d 117, 132-133 (Ala. 2006)). But in *Prowell*, a doctor's deposition testimony was excluded because "there was no way to authenticate" that the doctor "qualified as a 'similarly situated health care provider,' as required to ***testify as an expert***." 949 So. 2d at 131 (emphasis added). *Prowell* is thus beside the point. The point here is that Dr. Downs's testimony was *factual*, so he did not have to meet the requirements of Section 6-5-548 to testify. On that point, Plaintiff has nothing to say. In fact, Plaintiff does not dispute that this was merely factual testimony.

Plaintiff's arguments about Nurse Nash's improperly excluded fact testimony fare no better. She first says Nurse Nash had to disclose her fact testimony in her Rule 26 expert disclosures. Red Br.39-40. That is wrong. Rule 26(b)(5)(A)(i) governs the disclosure of an expert's opinions, not lay testimony. Ala. R. Civ. P. 26(b)(5)(A)(i). Nurse Nash's excluded

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not consider" such arguments. *Bentley Sys., Inc. v. Intergraph Corp.*, 922 So. 2d 61, 85 n.8 (Ala. 2005).

testimony was factual. Plaintiff does not—because she cannot—deny that a witness can testify both as an expert and lay witness. *See United States v. Caballero*, 277 F.3d 1235, 1247 (10th Cir. 2002).

Wrong on the merits, Plaintiff raises another baseless waiver argument. On the one hand, she argues that the trial court "determined that Nurse Nash would not be permitted to testify" after the "parties argued about this motion [in limine] at length" (Red Br.38-39), while on the other, she says—no—it was only a preliminary ruling, so another objection was required, Red Br.40. Yet that ignores that the trial court revisited its earlier ruling and, on the eve of Nurse Nash's testimony, unequivocally held that Nurse Nash could not testify about "her observations in various hospitals seen as a surveyor for the Joint Commission." C.2428. To remove all doubt, moments before she took the stand, the trial court reiterated that Nurse Nash could not testify about her observations. R.2564-2568. No further objection was required after that absolute and unconditional ruling. Likewise, "no subsequent offer of proof was required to preserve the issue for appellate review." *Cannon v. Lucas*, 346 So. 3d 949, 953 (Ala. 2021).

Plaintiff also seems to suggest that Springhill cannot challenge the trial court's exclusion of Nurse Nash's testimony because the trial court excluded the testimony. Red Br.41. As Justice Scalia would say: "Pure applesauce." *King v. Burwell*, 576 U.S. 473, 507 (2015) (Scalia, J., dissenting). If Plaintiff were correct, then an exclusion of testimony would never be appealable. That is not the law.

With nowhere else to turn, Plaintiff tries to recast Nurse Nash's testimony, claiming that she "admitted that she was at best familiar with the practices at just 0.2% of hospitals in the country." Red Br.41. For that, Plaintiff merely cites her own counsel's spin on Nurse Nash's testimony in a post-judgment deposition. Ultimately, the bar for relevancy is low, *see Ex parte Vincent*, 770 So. 2d 92, 96 (Ala. 1999), and Nurse Nash's observations about other hospitals easily cleared it. Plaintiff's arguments about the substance of Nurse Nash's testimony go to weight, not admissibility.

The prejudice from the trial court's error was plain, and Plaintiff makes no contrary argument. Exploiting the trial court's exclusion of highly relevant evidence, Plaintiff was able to paint Springhill as a dangerous outlier. Had the jury heard the improperly excluded

testimony, they would have known that Springhill acted in the same manner as its peer institutions.

D. The good count/bad count rule requires a new trial.

The good count/bad count rule requires a new trial. When a plaintiff alleges different acts or omissions as multiple bases for a single negligence claim (*e.g.*, negligent failure to train and negligent failure to question a medication dose), the plaintiff must present substantial evidence in support of each basis. *Long*, 980 So. 2d at 385-87.

Trying to avoid that rule, Plaintiff claims that Springhill did not object to the court's jury charge, so the charge "became the law of the case." Red Br.46. Plaintiff conflates error with a jury charge with erroneous denial of judgment as a matter of law. This Court has been clear: "[I]t is not necessary for purposes of preservation for a party seeking to appeal a trial court's denial of that party's motion for a JML to object to the trial court's jury instructions on the same grounds as set forth in its motions for a JML." *Complete Cash Holdings, LLC v. Powell,* 239 So. 3d 550, 557 n.7 (Ala. 2017) (citation omitted). Springhill moved for judgment as a matter of law at the close of Plaintiff's case and at the

close of all the evidence based on Plaintiff's failure of proof on her negligent-training theory. C.2419-22,2443-51. No more was required.[9]

Plaintiff also says that the good count/bad count rule does not apply because the jury was charged "about one single count of negligence, not Mrs. West's alternative theories of negligence." Red Br.42-43 (citing *Regions Bank v. Plott*, 897 So. 2d 239, 246 (Ala. 2004)). Plaintiff's reliance on *Regions* is misplaced—that case involved distinct causes of action, not a sub-set of a single negligence cause of action, as is the case here. *Id.* In sum, Springhill's good/bad count argument is preserved, and it requires a new trial.

1. Plaintiff failed to present substantial evidence of a required element of Plaintiff's negligent-training claim.

On the question of whether the trial court erred in failing to recognize the absence of substantial evidence to support Plaintiff's negligent-training theory, the parties appear to agree on several dispositive principles. Plaintiff does not embrace the trial court's

[9] Contrary to Plaintiff's assertion, this Court need not overrule *Bednarski* for Springhill to prevail on this point because *Bednarski* involved a jury being charged on an unpleaded claim, not a failure of proof on a theory of negligence. *Bednarski v. Johnson*, No. 1200183, 2021 WL 4472478, at *13-14 (Ala. Sept. 30, 2021).

justification for its ruling—that is, she does not (1) dispute that this Court makes no distinction between negligent training and negligent retention; or (2) dispute that she could not meet her burden through a post-trial adverse inference. Nor does Plaintiff dispute that she had to prove that Springhill knew or should have known about Nurse Elenwa's "specific acts of incompetency." *See* Blue Br.37 (quoting *Ex parte Huntsville Emergency Med. Servs., Inc.*, --- So. 3d. ---, 2022 WL 4115311, at *5 (Ala. Sept. 9, 2022)); *see also* Red Br.47-51.

Unable to point to any specific acts of incompetence, Plaintiff claims that Nurse Elenwa's purported lack of specific training is enough to satisfy her burden. Red Br.48-50. Plaintiff is wrong. Under Plaintiff's "reasoning, any employee—even with extensive experience or a spotless record—would be considered 'incompetent' unless fully retrained by each successive employer." *Craft v. Triumph Logistics, Inc.*, 107 F. Supp. 3d 1218, 1224 (M.D. Ala. 2015). That is "simply not the standard in Alabama." *Id.*

Plaintiff's attempts to distinguish *Craft* are unavailing. Faced with law that evidence of lack of training is insufficient to establish a claim, Plaintiff points to the same evidence of lack of training. Red Br.48. That

is nonresponsive. Plaintiff then says that her expert testified that the standard of care required Nurse Elenwa to receive specific training. Red Br.50. But that is irrelevant—all the testimony in the world cannot override Alabama law. And Alabama law required Plaintiff to present substantial evidence that Springhill knew or should have known of specific acts of incompetence by Nurse Elenwa. *Ex parte Huntsville Emergency*, 2022 WL 4115311, at *5.

Finally, recognizing that Nurse Elenwa had been trained, Plaintiff insists that the "jury was free to disregard" testimony about Nurse Elenwa's previous training because it came from Nurse Elenwa. Red Br.51. But multiple witnesses testified that Nurse Elenwa was certified and had received training at school and at Springhill. *See* R.1056-63 (Plaintiff's expert, Nurse Arnold); R.2103-04 (Nurse Hawkins); R.960-62 (Nurse Banks); R.2594-97 (Nurse Nash).[10]

[10] For that same reason, Plaintiff's repeated assertion that Springhill did nothing to protect its patients from the hazards of IV opioid administration is wrong.

2. Plaintiff failed to present substantial evidence of a breach of the standard of care connected to the nurse's failure to second guess the doctor's medication-dosing decision.

Plaintiff also fails to present valid arguments to overcome her lack of proof on her theory that Nurse Elenwa negligently failed to question the dosing decision made by Mr. West's physician. Plaintiff does not deny that Alabama's learned-intermediary doctrine "addresses questions of liability in light of the relationships between the parties involved in the distribution, prescribing, and use of prescription drugs." Blue Br.42 (quoting *Springhill Hosps., Inc. v. Larrimore*, 5 So. 3d 513, 518 (Ala. 2008)). Nor does she deny that "medicine dosing is outside the scope of matters on which a nonphysician—such as Nurse Elenwa—would be competent." Blue Br.43 (citing *Larrimore*, 5 So. 3d at 518-19).

Perhaps recognizing that Alabama law does not place a duty on nonphysicians to second-guess a doctor's dosing decision, Plaintiff tries to override the law through witness testimony. She claims that "[e]very physician and nursing witness . . . agreed" that a nurse has a duty to "question[] a physician's medication orders." Red Br.52-53. Even if Plaintiff presented such evidence, witness testimony cannot change a rule of law announced by this Court. And this Court has been clear: "The

physician's standard of care regarding proper dosages of medication is not within the scope of matters on which nonphysicians are competent." *Larrimore*, 5 So. 3d at 519 (quoting *Walls v. Alpharma USPD, Inc.*, 887 So. 2d 881, 882 (Ala. 2004) (alteration adopted)). For that same reason, Plaintiff's insistence that the Nurse Practice Act required Nurse Elenwa to question the dosing decision of a doctor is irrelevant. Red Br.53. While that Act could give rise to discipline by the Board of Nursing, it does not override Alabama's learned-intermediary doctrine as announced by this Court.

Unable to clear *Larrimore*'s insurmountable hurdle, Plaintiff attempts to distract the Court by discussing evidence concerning other alleged negligence by Nurse Elenwa, such as giving Mr. West's second dose too early. Red Br.52. That dodge will not work. Plaintiff unquestionably contended at trial and still contends now that Nurse Elenwa should have second-guessed the doctor's dosing decision. *See*, *e.g.*, R.811; R.2927; R.2941; Red. Br.52-53,55-56. That theory fails under *Larrimore*, so Plaintiff had a failure of proof on that aspect of her negligence claim.

* * *

In sum, Plaintiff had a failure of proof on her negligent-training theory and her dosing-based negligence theory. The circuit court erred in failing to enter JML on those theories. Because the jury returned a general verdict, the good count/bad count rule requires a new trial.

II. The cap on medical-liability wrongful-death punitive damages in Section 6-5-547 should be applied.

The cap on medical-liability wrongful-death punitive damages in Section 6-5-547 should apply here. In her brief, Plaintiff does not try to defend the reasoning of this Court's decision in *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995), which held Section 6-5-547 unconstitutional on equal-protection and jury-trial-right grounds. Indeed, this Court's later decisions show that *Schulte* was plainly wrong. *See Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999); *Ex parte Apicella*, 809 So. 2d 865 (Ala. 2001). Rather than defend *Schulte*'s reasoning, Plaintiff raises stare decisis and implied-repeal arguments that flout precedent. This Court should reject Plaintiff's arguments and reinstate the statutory cap.

To start, Plaintiff attacks *Melof* and *Apicella* as "*plurality* opinions" that could not have undermined *Schulte*'s holding that Section 6-5-547 is unconstitutional. Red Br.57-58. Plaintiff is wrong. To be sure, a

plurality in *Melof* emphasized that "Alabama's so-called 'equal-protection provision' sits upon a totally nonexistent foundation," holding "that 'there is no equal protection clause in the Constitution of 1901.'" 735 So. 2d at 1186 (citation omitted). But two more justices agreed that the plurality "correctly" found "that there is no single, express equal-protection provision in the Constitution of Alabama of 1901." *Id.* at 1194 (See, J., concurring specially). Likewise, in *Apicella*, the plurality expressly held that *Schulte* was "wrongly decided" to the extent it held that the Alabama Constitution "restricted the Legislature from removing from the jury the unbridled right to punish." 809 So. 2d at 874. And a fifth Justice agreed that if the Court followed *Schulte* "and gave primacy to the jury in matters dealing with punishment, then we would perhaps be reverting to a system that would violate the United States Constitution." *Id.* (Lyons, J., concurring). Despite Plaintiff's contrary arguments, *Melof* and *Apicella* fatally undermine *Schulte*.[11]

[11] Regardless, *Schulte*'s constitutional errors are obvious. Plaintiff does not dispute that *Schulte* invented an equal-protection provision divorced from the Alabama Constitution's text and history. *See Melof*, 735 So. 2d at 1181-86. Nor does Plaintiff argue that the Alabama Constitution was understood at ratification to prohibit the legislature from altering the jury's right to punish. *See Apicella*, 809 So. 2d at 873-74.

Unable to defend *Schulte*, Plaintiff retreats to stare decisis. She claims that this Court has had chances to reconsider *Schulte* and the constitutionality of Section 6-5-547 but has declined to do so. Red Br.60-62. But stare decisis does not counsel continued acceptance of *Schulte*'s errors. "[W]hen the Constitution is misinterpreted, the doctrine of stare decisis is not entitled to the deference it otherwise receives." *Marsh v. Green*, 782 So. 2d 223, 232 (Ala. 2000). Courts need not adhere to erroneous constitutional decisions just because they have previously done so. *See, e.g.*, *Ex parte Pinkard*, No. 1200658, --- So. 3d ---, 2022 WL 1721483, at *4-7 (Ala. May 27, 2022) (overruling constitutional decision that had been followed in later cases).[12]

Plaintiff also argues at length that Section 6-5-547 has been impliedly repealed by Section 6-11-21. But Plaintiff simply ignores the

[12] Plaintiff's citations to *Hodgen*, *Mobile Infirmary v. Tyler*, 981 So. 2d 1077 (Ala. 2007), and *Gillis v. Frazier*, 214 So. 3d 1127 (Ala. 2014), are misplaced. Red Br.57-58. *Hodgen* did not address Section 6-5-547. 884 So. 2d at 813-15. In *Tyler*, the proponent of reviving Section 6-5-547 had not addressed—and so failed to distinguish—*Hodgen*. 981 So. 2d at 1104-05. And in *Gillis*, the Court stated only that it was "not persuaded" at the time to overrule *Schulte*. 214 So. 3d at 1134. But *Schulte* has not just been abrogated by later decisions—but even when it was decided, it was divorced from the historical record and wrong as an original matter. Blue Br.46-47; *supra* 24-25. The Court need not—and should not—adhere to an ahistorical misinterpretation of the Alabama Constitution.

very high bar set by the Court to find an implied repeal. "Implied repeal of a statute is not favored by the courts and will be found only when the two statutes are so repugnant to, or in such conflict with, one another that it is obvious that the legislature intended to repeal the first statute." *Benson v. City of Birmingham*, 659 So. 2d 82, 86 (Ala. 1995).

Plaintiff cannot establish an implied repeal here. In fact, Plaintiff concedes that Section 6-11-21(j) "excludes wrongful death actions from the cap imposed in amended § 6-11-21(a)." Red Br.65-66. Plaintiff does not explain how, in enacting a statute that expressly does not apply to wrongful death actions, the Legislature "obvious[ly]" intended to repeal a statute exclusively directed to wrongful death actions. *See Benson*, 659 So. 2d at 86. Indeed, that express provision in Section 6-11-21 conclusively disposes of the implied-repeal argument. As this Court has held, when "'there is a reasonable field of operation, by a just construction, for both [statutes], they will be given effect.'" *Id.*; *accord City of Birmingham v. S. Express Co.*, 51 So. 159, 162-63 (Ala. 1909) (explaining that implied repeal "is never the case if there be a reasonable field of operation" for both statutes). A "reasonable field of operation" for both statutes exists here. Section 6-5-547 caps punitive damages in

medical-liability wrongful-death actions, while Section 6-11-21 applies to non-wrongful-death cases.[13]

Nor does it matter that the legislature has not reenacted Section 6-5-547 despite having "annual opportunities since [*Schulte*] . . . to do so." Red Br.62-63. The legislature cannot correct *Schulte*'s constitutional error. After all, when a decision misinterprets the Constitution, "correction through legislative action is practically impossible." *Marsh*, 782 So. 2d at 232 (citation omitted); *accord Portersville Bay Oyster Co., LLC v. Blankenship*, 275 So. 3d 124, 133 n.5 (Ala. 2018). In any event, the legislature's inaction says nothing about *Schulte*'s correctness and does not show that Section 6-5-547 has been impliedly repealed. A court cannot presume that a judicial "declaration automatically becomes a legislative pronouncement in the face of ensuing legislative silence." *Ex parte Christopher*, 145 So. 3d 60, 70 (Ala. 2013). Plaintiff does not explain how the legislature's failure to reenact a statute that this Court held unconstitutional in a decision the Court has yet to overrule somehow

[13] For this reason, Plaintiff's analogy to Section 6-5-544(b) is wrong. Red Br.65-66. Section 6-11-21(j) "ma[d]e no mention of excluding actions brought pursuant to the AMLA," but it expressly excludes "wrongful-death actions." *Hodgen*, 884 So. 2d at 814. Thus, there was no legislative intent to replace this wrongful-death punitive-damages cap.

amounts to legislative acquiescence. "The mere passage of time, therefore, has not diminished the power of this Court to reconsider [*Schulte*]." *Id.*

Finally, Plaintiff fires yet another salvo of meritless waiver arguments. She contends that Springhill's answer did "not raise the former damages cap issue with the [same] specificity," Red Br.61-62, but Springhill's answer expressly stated that "Plaintiff's damages are limited as provided in § 6-5-547," C.769. She says that Springhill raised this issue "after the 30-day deadline of Ala. R. Civ. P. 59 for raising new trial issues had passed," Red Br.62, but Springhill's new-trial motion argued that "[t]he punitive damages award exceeds the cap contained in Ala. Code § 6-5-547," C.2614. And she claims that Springhill never moved pretrial to enforce the damages cap. Red Br.62. No pretrial motion was required. And Springhill asserted the cap in its Answer, as well as its motion for judgment as a matter of law by incorporating its affirmative defenses. C.2453-54. In any event, until the jury returned a verdict exceeding the statutory cap, there was nothing for the trial court to

enforce.[14]

* * *

Because Section 6-5-547 is a constitutional statute and has not been repealed, the Court should enforce it and reduce the punitive award.

III. At a minimum, the Court should order a substantial reduction of the $10 million punitive award.

Based upon the federal due-process guideposts and the state-law remittitur factors, the unprecedented $10 million punitive award should be reduced to no more than $2 million.

A. The standard of review is de novo.

Although it is settled that this Court reviews de novo the punitive award, *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 57 (Ala. 2001), Plaintiff disregards that standard of review. She erroneously contends that the trial court's order is "entitled to great deference," asking this Court to rubberstamp it. Red Br.94. And she claims that the jury's

[14] Plaintiff also makes the meritless assertion that Springhill failed to comply with Ala. Code § 6-6-227 because it did not serve the Attorney General with notice of a "constitutional challenge affecting § 6-5-547." Red Br.62. Section 6-6-227, however, requires the Attorney General to be served only when "the statute . . . is alleged to be unconstitutional." Ala. Code § 6-6-227; *accord Ex parte Squires*, 960 So. 2d 662, 664 (Ala. 2006). Springhill alleges just the opposite—that § 6-5-547 is constitutional.

verdict is a "collective finding of fact about how bad the defendant's conduct was," such that this Court may not "substitute its judgment for a wrongful death jury's factual findings." Red Br.77. That is plainly wrong. As this Court has held, "[i]n applying the de novo standard of review to [a] constitutional challenge to the amount of the punitive-damages award," the Court "must review the evidence and the law without deference to the jury's award or to the trial court's rulings." *Horton Homes*, 832 So. 2d at 57. This Court must engage in a complete de novo review without deferring to either the jury or the trial court.[15] *Id.*

B. Springhill's conduct did not evince a high level of reprehensibility.

Plaintiff's brief demonstrates that Springhill did not act in a highly reprehensible manner. She focuses on conduct and decisions by actors other than Springhill; she does not dispute that compliance with industry practice establishes a lower level of reprehensibility; and she identifies no evidence that Springhill tried to cover up any wrongdoing. The absence of a high degree of reprehensibility compels a massive reduction of the punitive award. Blue Br.52-59.

[15] In any event, the jury returned a general verdict and made no "specific findings of fact" for this Court to defer to.

1. Plaintiff criticizes Springhill for decisions it did not make.

As evidence of *Springhill's* alleged reprehensibility, Plaintiff largely points to the conduct of others. For example, Plaintiff (like the trial court) focuses much of the reprehensibility argument on the size of the Dilaudid dose that Mr. West received. She cites Dr. Rothfield's testimony that the Dilaudid dose was "the most egregious overdose" he had seen; Dr. Nelson's testimony that the dose was "extremely high"; Dr. Spires's testimony that he "would never give a dose like that"; and Levin's testimony that the dose was "outrageous." Red Br.71.

But Plaintiff ignores that Springhill did not make the dosing decision; it was made by Mr. West's prescribing physician. Indeed, Plaintiff's own expert conceded that the 4mg dose was what the physician prescribed and that Nurse Elenwa could not alter it. R.834,849-50. Any liability for that dosing decision rests with Mr. West's prescribing physician—not with the nurse who administered it. Blue Br.41-44,53-54. As this Court recently reiterated, "[a]s a medical expert, the prescribing physician can take into account the propensities of the drug as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers." *Blackburn*

v. Shire U.S., Inc., --- So. 3d ---, 2022 WL 4588887, at *4 (Ala. Sept. 30, 2022) (citation omitted).

Plaintiff also focuses on the alleged lack of continuous-pulse-oximetry equipment for monitoring Mr. West. But Plaintiff concedes "that SMH had monitoring available in certain places within the hospital." Red Br.76. Nor does she dispute that Mr. West's surgeon could have—but did not—assign Mr. West to one of those units. Blue Br.57. And she also does not dispute that Springhill had monitoring equipment in the orthopedic unit to which Mr. West was assigned that could have been used if Mr. West's surgeon ordered it. Blue Br.57-58. In light of these undisputed facts, Plaintiff contends that Springhill "breached the standard of care by not having monitoring available *throughout the hospital*." Red Br.76. But liability is different than reprehensibility. Even if Springhill breached the standard of care, it did not act with great reprehensibility when it had monitoring available in certain units and available in Mr. West's unit at the surgeon's orders. In fact, Springhill's policies in this regard aligned with those of most hospitals in 2014. *Infra* 35-36; Blue Br.56-57.

Perhaps realizing that much of the allegedly reprehensible conduct at issue traces back to Mr. West's physician (for whose conduct Springhill is not liable), Plaintiff says that "[w]hatever Dr. McAndrew did or did not do should have no bearing on this Court's remittitur analysis." Red Br.87. That is wrong—Alabama law mandates this comparison. *See Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1219 (Ala. 1999) (comparing relative degrees of culpability in remittitur analysis). Plaintiff responds by faulting Springhill for asserting no crossclaims against the prescribing physician. Red Br.76n.44,86-87. But "under Alabama law, joint tortfeasors are not entitled to contributions from one another" and generally "are not entitled to indemnity from one another." *Ex parte Stenum Hosp.*, 81 So. 3d 314, 318 (Ala. 2011). Springhill could have asserted no crossclaims against Mr. West's physician.

Plaintiff also says that the prescriber's conduct cannot be considered because "the jury was never asked to make any . . . determination" of his fault. Red Br.87. But that was true in *Lance* too. There, only one defendant proceeded to trial, but this Court still reviewed the evidence of all the actors' conduct and decided that one of the defendants that had not proceeded to trial was the most culpable actor.

Lance, 731 So. 2d at 1207, 1219. Nor does it matter that Plaintiff elected not to sue Dr. McAndrew. A plaintiff cannot avoid the necessary reprehensibility comparison by choosing not to sue an alleged tortfeasor. Such a rule would encourage plaintiffs to sue only alleged tortfeasors with the most resources, in the hopes that they could be liable for the culpable conduct of less-resourced actors.

In short, Plaintiff (and the trial court) repeatedly criticize the dosing size that Mr. West received and the failure to monitor him. But Springhill is not responsible for that dosing decision, and Springhill had monitoring available had Mr. West's physician ordered it. The physician's alleged failures—which are what Plaintiff largely focuses on—are not attributable to Springhill in the reprehensibility calculus.

2. Springhill's policies aligned with industry practice.

Like the trial court, Plaintiff tries to paint a reprehensibility picture by asserting that Springhill failed to implement adequate policies and procedures to address the risk of opioid-induced respiratory depression in postsurgical patients and that it failed to have continuous pulse oximetry monitoring available throughout the hospital. Red Br.75-76.

But that alleged conduct does not show a high degree of reprehensibility because Springhill's policies aligned with industry practice. The evidence shows that Springhill's training and monitoring policies for post-operative patients receiving IV opioids aligned with what most hospitals in the country did at the time of Mr. West's death. Blue Br.56-57. Likewise, most hospitals did not have continuous pulse oximetry available for such patients. *Id.* And in 2014, Massachusetts General, Harvard's flagship teaching hospital, also used continuous pulse oximetry only when ordered by a doctor. Blue Br.57. A defendant who complies with industry practice does not engage in reprehensible conduct. *See Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1066-67 (10th Cir. 2016) (evidence that defendant "conformed to industry standards" weighed against a finding of reprehensibility). Indeed, Plaintiff does not dispute that compliance with industry practice shows a lack of reprehensibility. Red Br.75-76. Yet the trial court never even mentioned this critical evidence.

Unable to dispute that a defendant's compliance with industry standards warrants a massive reduction of the punitive award, Plaintiff tries to paint the same misleading picture presented at trial. Red Br.75-

76. She claims that it is not true that most hospitals did not use continuous pulse oximetry monitoring in 2014. But none of Plaintiff's record cites support that contention; they say nothing about what most hospitals did in 2014. Red Br.75-76. Plaintiff also says that the "repeated contention [in an appellate brief] that 'the majority of hospitals' were not using continuous pulse oximetry in 2014 . . . can[not] change the truth as found by the jury." Red Br.75-76. But Plaintiff ignores that the jury never heard this evidence. The trial court wrongly excluded evidence from Nurse Nash and Dr. Downs that most hospitals did not use continuous pulse oximetry at the time.[16] *See supra* 14-18. Plaintiff's argument only underscores the error here: It is telling that she rests much of the reprehensibility (and, indeed, the liability) story on an

[16] To that point, Plaintiff insists that Springhill "did not present *any* standard of care evidence from *any* witness regarding *any* effort to comply with the requirements of the standard of care." Red Br.79. That's misleading. The trial court excluded evidence of what most hospitals were doing, which the jury could have considered in determining compliance with the standard of care. Blue Br.27-35. Having successfully excluded this evidence, Plaintiff cannot fairly argue that Springhill lacked such evidence at all. Moreover, Springhill's nursing expert Brandy Mobley testified that Nurse Elenwa met the standard of care in caring for a post-op patient like Mr. West. R.2202-05.

incomplete and inaccurate depiction of Springhill as a dangerous outlier.[17]

3. There is no evidence of any concealment or cover-up by Springhill.

There is no evidence that Springhill covered up any supposed wrongdoing.[18] Plaintiff's brief is telling on that point. Rather than identify anything Springhill concealed, Plaintiff (like the trial court) repeatedly focuses on Nurse Elenwa's *post-employment* conduct of lying in her deposition. Red Br.70,72,80-81. To be sure, Nurse Elenwa should have told the truth, but her conduct cannot be attributed to Springhill in the reprehensibility analysis. Instead, to apply vicarious liability, "the status of employer and employee [must] exist[] at the time of the [challenged] act." *Newsome v. Mead Corp.*, 674 So. 2d 581, 583 (Ala. Civ. App. 1995); *accord Donaldson v. Country Mut. Ins. Co.*, 291 So. 3d 1172, 1175 (Ala. 2019) ("To recover against a defendant on the theory of respondeat superior, it is necessary for the plaintiff to establish the

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[17] Plaintiff's assertion that Nurse Elenwa did not make an "isolated" dosing mistake ignores that her conduct occurred in a compact timeframe over a few hours. *See* Blue Br.12-13.

[18] Plaintiff does not dispute—as Springhill argued, Blue Br.59—that the trial court erred in considering evidence that Mr. West had allegedly been administered Narcan as evidence of concealment.

status of master and servant and to establish that the act was done within the scope of the servant's employment." (Citation omitted)). Plaintiff does not dispute that when Elenwa was deposed, she was a former employee living in another state. Vicarious liability principles do not allow Springhill to be punished for a former employee's litigation misconduct over which it lacked control.

Unable to identify any cover-up by Springhill, Plaintiff erroneously argues (Red Br.82-83) that Springhill tried to intimidate Dr. James Spires, a physician who had admitting privileges at Springhill. She claims that Dr. Spires "testified that [Springhill's] CEO . . . attempted to chill his testimony by attending his deposition." Red Br.82. But Dr. Spires testified only that the CEO attended his deposition, not that he felt this was an attempt to affect his testimony. R.1755. And Plaintiff's contention that Springhill "eliminated [Dr. Spires's] elective surgical time," Red Br.83, is simply wrong. Springhill eliminated half-day surgical block reservations due to COVID, a fact that was communicated to 95 other surgeons. R.2153-59. And Dr. Spires retained the ability to perform surgeries at Springhill. R.2168-69. Even the trial

court recognized that Springhill had "cleared up" this purported retaliation issue. R.3329-30.

C. Springhill lacked fair notice of the size of the punitive-damages award.

The punitive award is strikingly out of line with every other wrongful-death medical-liability award that this Court has affirmed in a published decision since the U.S. Supreme Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). To that point, Plaintiff does not dispute that $4 million is the highest post-*BMW* award that this Court had affirmed at the time of Mr. West's death. Rather than dispute these realities, Plaintiff tries to avoid this simple math through a series of novel and indefensible arguments.

Plaintiff begins by misleadingly asserting that Springhill requests "a prior reported affirmed verdict on identical facts." Red Br.89. Springhill made no such argument. To be sure, the comparable-awards factor requires courts to "[c]ompar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. That comparison necessarily requires the Court to consider the *amount*—not the facts—of prior affirmed medical negligence awards.

Plaintiff then argues that Springhill knew "of the risk of incurring punishment if found liable for proximately causing death." Red Br.89-90. Plaintiff misses the point. It is not enough for a defendant to know that certain conduct might subject it to punitive damages. On the contrary, "[d]ue process also requires, and state courts must now determine, whether the tortfeasor had adequate notice of the *severity* of the penalty that might be imposed for the activity he engaged in." *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 510 (Ala. 1997) (emphasis added); *accord BMW*, 517 U.S. at 574. That is why this *BMW* factor requires the Court to "compare the damages awarded in this case to damages awarded in similar cases." *Lance*, 731 So. 2d at 1219. Plaintiff does not dispute this Court has not affirmed an award of this magnitude post-*BMW*.

Next, Plaintiff insists that remittitur would require this Court to overrule its *Bednarski* decision. Red Br.90. Not so. In *Bednarski*, this Court did not approve the use of pre-*BMW* awards; it stated only that the appellants had "failed to demonstrate that the trial court's judgment should be reversed" because it had considered a pre-*BMW* case in its comparator analysis. 2021 WL 4472478, at *19. But here, Springhill has shown that the trial court's consideration of pre-*BMW* affirmed awards

was error. Blue Br.62-64. Indeed, *BMW* mandates a "more meaningful judicial review" of punitive awards when "challenged by a tortfeasor as excessive." 701 So. 2d at 510; *accord Bednarski*, 2021 WL 4472478, at *25 (Mitchell, J., concurring in part and dissenting in part) ("[I]t cannot reasonably be disputed that this Court . . . began to more closely review and rein in excessive awards" after *BMW*.). So the comparator analysis must "focus[ ] on cases decided after *Gore* that properly apply the framework developed" there. *Bednarski*, 2021 WL 4472478, at *25 (Mitchell, J., concurring in part and dissenting in part).

Finally, recognizing that this award is unprecedented in the post-*BMW* era, Plaintiff embraces the trial court's improper use of inflation to adjust prior awards. Red Br.90-92. Plaintiff cites no Alabama authority for this groundbreaking change, nor has any Alabama appellate court directed trial courts to adjust prior awards for inflation. That is critical. This factor protects a defendant's due process right to "fair notice" of the severity of a penalty that may be imposed. *BMW*, 517 U.S. at 584. Absent any judicial decision (or legislative enactment) accounting for inflation, Springhill lacked fair notice that an inflation adjustment would be made to comparator awards.

In short, at Mr. West's death, this Court had never affirmed post-*BMW* a medical-malpractice award of more than $4 million. And this Court has never directed that inflation be considered in comparing awards. Springhill thus lacked "fair notice" that it could be subjected to a penalty of $10 million or anything close to it.

D. The cost of litigation indicates that the punitive-damages award is excessive.

The costs-of-litigation factor also shows that the punitive award is excessive. Plaintiff does not dispute that her litigation costs are just 3.25% of the punitive award, and Plaintiff wrongly refused to produce evidence of her counsel's attorney's fees. Blue Br.67-69. In her response, Plaintiff ignores these arguments.

As to costs, Plaintiff parrots the trial court's reasoning that medical-liability cases are "expensive" and "very difficult to prevail" on. Red Br.85. But neither Plaintiff nor the trial court explained why a $10 million punitive award is necessary to cover $325,000 in expenses. Those figures are massively out of whack. And as to her fees, Plaintiff does not dispute that attorney's fees are relevant to the remittitur analysis, and she does not defend her failure to produce fee-related evidence. Red Br.85-86.

This Court should thus either deem the costs-of-litigation factor as supporting further remittitur of the punitive award or remand the case so that Springhill can obtain the relevant fee information.

CONCLUSION

For these reasons (and for those stated in the Blue Brief), this Court should reverse the judgment against Springhill and order a new trial. In the alternative, the Court should order that the amount of the punitive award is capped at $2,547,216 under Section 6-5-547, and the Court should further reduce the punitive award to an amount of no more than $2 million.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(d) of the Alabama Rules of Appellate Procedure, I hereby certify that this brief complies with the November 4, 2022 order of this Court setting a word limit of 9,000 words. This brief contains 8,993 words, excluding the parts of the brief exempted by Rule 28(j)(1) and Rule 32(c) of the Alabama Rules of Appellate Procedure.

This brief complies with the font and type style requirements of Rule 32(a)(7) of the Alabama Rules of Appellate Procedure because this brief has been prepared using Microsoft Word in Century Schoolbook, font size 14.

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